

SUMMARY

Ann Arroyo (“Plaintiff”) filed a suit for breach of duty, breach of contract, and breach of express and implied warranties against Regal Builders, LLC, Regal Contractors, LLC (“Regal”), and Pala Tile & Carpet Contractors, Inc. (“Pala,” together with Regal, “Defendants”). In December 2011, Plaintiff purchased and took delivery of a new construction home built primarily by Regal with some additional work completed by Pala. Plaintiff alleges that she discovered significant defects in the home during the first year of her ownership. She now requests damages associated with relocation and repair.

Plaintiff’s expert, Daniel Shewell (“Shewell”), inspected Plaintiff’s home, generating a report identifying numerous flaws in the shower, which he concluded were a result of substandard construction. Defendants move to exclude Shewell’s expert testimony, under the rationale that his opinion is not based in proper factual foundation and is unreliable.

The expert’s testimony possesses supportable, factual grounding and employs reliable methodology. Defendants’ Motion in Limine is **DENIED**.

FACTS AND PROCEDURES

On December 27, 2013, Plaintiff filed an action for breach of duty, breach of contract, and breach of express and implied warranties against Regal and Pala. This case arises out of the construction and purchase of a new home located at 614 Noble Pond Crossing, in the community of Noble’s Pond in Dover, Delaware. Plaintiff purchased and took delivery of the new home on December 27, 2011. After taking possession, Plaintiff created a list of defects in the home which

occurred during the first year of her ownership. The list included the alleged shower defects at issue in this Motion.

Plaintiff and Regal dispute the extent to which the claimed defects have been addressed. Plaintiff has had the home inspected at least twice to assess the alleged defects. Shewell performed a home inspection on April 16, 2015. Shewell is a member of the American Society of Home Inspectors (“ASHI”) and a certified home inspector. During his inspection, Shewell observed and documented the master bathroom shower. Shewell’s report contains a dozen annotated photographs identifying defects in the shower. In the report, Shewell states that the floor in front of the shower doors is not level, the shower doors are not level or square, the shower floor tile is discolored, the shower seat area is not level and contains loose tiles, and areas between the tiles have cracks or missing grout.

DISCUSSION

Defendants move to exclude the expert opinion and testimony of home inspector Shewell. Defendants do so pursuant to D.R.E. 702, arguing that Shewell’s opinion lacks proper foundation and reliability. *Perry v. Berkley*,¹ describes the proper role of a trial court in contemplating D.R.E. 702 challenges: “the trial court acts as a gatekeeper” to determine whether the “expert’s opinion [is] based upon proper factual foundation and sound methodology,” and is thus, admissible as

¹ 996 A.2d 1262 (Del. 2010).

evidence.² The Court has “broad latitude” in making such rulings.³

The “proper factual foundation” and “sound methodology” language has been distilled from D.R.E. 702, which provides in relevant part:

a witness qualified as an expert...may testify...in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁴

Addressing the “proper factual foundation” part of the analysis, *Perry* determined that to meet this criteria, an expert’s opinion must be based on “facts” of the case rather than “suppositions.”⁵ The “sound methodology” aspect of the test focuses upon the techniques used by the expert in formulating his opinion.⁶ The reliability of the opinion is determined by inquiring into such factors as: “(1) whether the technique or scientific knowledge has been tested or can be tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error and the control standards for the technique’s operation; and (4) whether

² *Id.* at 1267.

³ *Id.*

⁴ *Id.* at 1267-1268 (internal quotations omitted).

⁵ *Id.* at 1269.

⁶ *Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203, 1210 (Del. 2002) (expert’s opinion is reliable where “based on the methods and procedures of science...” (internal quotations omitted)).

the technique has gained general acceptance.”⁷ Importantly, the expert’s method must be based in *science* and not “subjective belief or speculation.”⁸ Courts are to review expert opinions to ensure they are “derived from supportable facts.”⁹

Defendants attack both the proper factual foundation and sound methodology of Plaintiff’s proposed expert. As to Shewell’s factual foundations, Defendants argue that the lapse in time between construction of the home and Shewell’s inspection of the home renders the facts and data underlying his opinion insufficient and unreliable. Defendants assert that Shewell’s report fails to account for the possibility that natural settlement of the home over time led to the shower’s leveling defects. Defendants also emphasize that Shewell’s report fails to note when cracks and missing grout occurred or whether they were present upon the home’s completion in 2011.

The issues that Defendants raise, for example, the fact that Shewell failed to account for one possible explanation for the shower defects, are questions that concern weight or credibility. Defendants’ argument, in sum, is that Shewell should have focused on a *different* set of facts from the one he found important in his report. However, as *Perry* has recognized, challenges to the “factual basis of an expert opinion go to the credibility of the testimony, not the *admissibility*. As is for the opposing party to challenge...the expert opinion on cross-examination.”¹⁰ It is only

⁷ *Quinn v. Woerner*, 2006 WL 3026199, at *2 (Del. Super. Ct. Oct. 23, 2006).

⁸ *Price*, 790 A.2d at 1210 (internal quotations omitted).

⁹ *Quinn*, 2006 WL 3026199 at *2 (internal quotations omitted).

¹⁰ *Perry*, 996 A.2d at 1271 (emphasis added).

in the narrow circumstance, where an expert has completely neglected core facts, that a court will exclude the testimony.

To say that Shewell’s opinion is founded “upon a *completely incorrect* case specific factual predicate,” would be too strong.¹¹ During the course of his inspection, Shewell used objective methods to measure and photograph the shower defects. Having personally inspected the home, he would have first hand knowledge of the facts underlying Plaintiff’s case. There is no evidence that Shewell’s report lacks a sufficient factual basis. Defendants’ alternative explanations for the shower defects are challenges to be raised during cross-examination.

Next is Defendants’ position that Shewell’s opinion lacks reliability, having not been formulated under “sound methodology.” In support of their contention, Defendants cite *Ward v. Shoney’s, Inc.*,¹² which required that an expert witness’s opinion be based upon more than “practical knowledge,” indicating that it should “refer to specific industry standards, studies, guidelines, regulations, scholarly works, or peer reviewed information.”¹³ Defendants argue that Shewell’s opinion did not employ reliable methods. Defendants assert that Shewell used “only” a level to measure relevant areas of the shower, reaching a summary conclusion that the shower did not conform to construction standards while omitting specific identification or date of those standards. Defendants also cite *Tumlinson v. Advanced Micro Devices*,

¹¹ *Id.* (emphasis in original).

¹² 847 A.2d 367 (Del. Super. 2002).

¹³ *Id.* at 381.

Inc.,¹⁴ which upheld exclusion of an expert’s testimony where his opinion lacked “testability,” reliability, and adequately detailed methodology.¹⁵ Defendants’ use of *Tumlinson* implies that Shewell’s opinion is not testable, and that his testimony is conclusory and lacks adequate methodology.

Defendants’ reliance on *Ward*, which was reversed on other grounds, is misplaced.¹⁶ As discussed with regards to the factual foundation of Shewell’s opinion, the home inspection involved objective methods of measuring and documenting the shower defects. Shewell’s opinion about the shower defects is based upon the standards created by the ASHI. That amounts to more than mere “practical knowledge.” Moreover, the use of a level as part of the home inspection permits replication of the results, adequately constituting scientific methodology to satisfy *Tumlinson*.

Shewell’s inspection, with the use of a level to measure and assess the shower, are not purely conclusory, unscientific techniques. This expert grounded his opinion in proper factual foundation. Thus, Defendants’ Motion in Limine is **DENIED**.

CONCLUSION

For the foregoing reasons, Defendants’ Motion in Limine is **DENIED**.

¹⁴ 81 A.3d 1264 (Del. 2013).

¹⁵ *Id.*

¹⁶ *See Ward v. Shoney’s, Inc.*, 817 A.2d 799 (Del. 2003) (reviewing part of the proposed expert’s challenged premise as common knowledge and remanding the case accordingly).

Arroyo v. Regal Builders, LLC, et. al.
C.A. No.: K13C-12-028 RBY
September 29, 2015

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBY/lmc
oc: Prothonotary
cc: Counsel
Opinion Distribution
File